

**IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL
Appeal against Order No. 420/2004.**

Union of India through
Executive Engineer,
Dehradun Central Division-I,
Central Public Works Department
Dehradun Appellant.

Versus

1. M/s Suresh Brothers through its
Proprietor Suresh Chander,
44/9, Sewak Ashram Road,
Dehradun.
2. Addl. District Judge/ Ist F.T.C.
Dehradun ... Respondents.

Sri Arvind Vashist, learned Addl. Solicitor General
for the appellant.

Sri Alok Singh, learned Senior Advocate for the
respondents.

Hon'ble Mr. Justice B.C. Kandpal, J.:

This Appeal against Order, U/s 39 of the Arbitration Act, 1940, has been preferred against the judgment and order dated 12-8-2004, passed by Addl. District Judge/ Ist F.T.C. Dehradun, in O.S. No. 618/1988, M/s Suresh Brothers Vs. Union of India and Misc. Case No. 144/1988, M/s Suresh Brothers Vs. Union of India, whereby the misc. case was allowed and the award dated 23/24-3-1988 was rejected and accordingly the original suit was also dismissed.

2- Brief facts giving rise to this appeal are that M/s Suresh Brothers entered into contract with Public Works Department of the Union of India for construction of 24 type-I quarters and 16 type-II quarters of Lal Bahadur Shastri Academy, Mussorrie and contract agreement No. 72/E.E./C.D. 11/83-84 was executed between the parties. Besides other conditions, condition Nos. 6 and 31 were also included in the contract. According to condition No.6 no payment shall be made

to the contractor for any damage caused by rain, snowfall, floods or any other natural cause whatsoever during the execution of the work and no such claim on this account shall be entertained. Condition No. 31 provided that before tendering, the tenderer shall inspect the site to fully acquaint himself about the condition in regard to accessibility of site nature and the extent of grounds working conditions including stacking of material, installations of T & P etc. Conditions affecting accommodation and movement of labour etc., required for the satisfactory execution of contract. No claim whatsoever on such account shall be entertained by the department in any circumstances. It was also provided that the payment shall be made to the contractor whenever certificate, as provided in part-7, is issued from time to time. The contractor/firm with the aforesaid conditions along with other conditions mentioned in the contract agreement executed the contract work. The case of the contract is that during execution of work, rock fell down on the newly constructed quarters, due to which the same were damaged. The contractor as per the provision mentioned in part-25 raised certain issues before the department to settle the claim and in this way dispute arose between them. Thereafter the dispute was referred to the Arbitrator. The Arbitrator conducted arbitration proceedings and made his award dated 23/24-3-1988, whereby claim of the contractor to the tune of Rs. 1,30,000/- was allowed against the department, whereas the contractor was held liable to return Rs. 8,29,000/- to the department from the payments made to him by the department from time to time.

3- Thereafter the award was filed before the court for making it rule of the court. In this regard original suit was registered and notices were sent to the parties.

4- The contractor filed objection against the award and the objection filed by the contractor was registered as misc. case separately. The contractor in his objection has pleaded that the Arbitrator has mis-conducted himself in making the award. However, the Union of India was also given opportunity to file objection. The Union of India did not raise any objection against the award but prayed for making it rule of the court.

5- The learned trial court consolidated the miscellaneous case as well as the original suit and after hearing learned counsel for the parties and perusing the record, allowed the objection filed by the contractor and accordingly rejected the award. Accordingly the original suit for making the award as rule of the court was also dismissed.

6- Feeling aggrieved by the aforesaid judgment and order dated 12-8-2004, passed by the trial court, this appeal has been preferred before this court.

7- Heard learned counsel for the parties and perused the record.

8- Before entering into the controversy involved in the instant case, it would be material to go through certain relevant clauses of the Arbitration Act. Clause – 7 of the Arbitration Agreement reads as follows:-

“Clause 7 –No payment shall be made for a work estimated to cost rupees five thousand or less till

after the whole of the work shall have been completed and certificate of completion given. But in the case of a work estimated to cost more than rupees five thousand, the contractor shall, on submitting the bill be entitled to receive a monthly payment proportionate to the part thereof then executed to the satisfaction of the Engineer-in-Charge, whose certificate of the sum so payable shall be final and conclusive against the contractor. But all such intermediate payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed, or re-erected or be considered as an admission of the due performance of the contract, or any part thereof in any respect or the accruing of any claim, nor shall, it conclude, determine or affect in any way the powers of the Engineer-in-Charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. "The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work or of the date of the certificate of completion furnished by the Engineer-in-Charge and payment shall be made within three months if the amount of the contract plus that the additional items is upto Rs. 2 lakhs and in 6 months if the same exceeds Rs. 2 lakhs of the submission of such bill. If, there shall be any dispute about any item or items of the work then the undisputed item or items only shall be paid within the said period of three months and six months as the case may be. The contractor shall

submit a lists of the disputed items within thirty days from the disallowance thereof and if he fails to do this, his claim shall be deemed to have been fully waived and absolutely extinguished.”

9- Clause – 7 was further reveals that whenever there is likely to be delayed in recording detailed measurements for making a running payment in the case of resdl. bldgs, advance payments without detailed measurements for works done, {other than foundation and furnishing items} up-to (a) Lintel level (i/e sun shade etc.) and (b) slap level, for each floor worked out at 75% of the tendered rates may be made in running account bills by the Engineer-in-Charge in his discretion on the basis of a certificate from the A.E. to the effect that the work has been completed up-to level in question. The advance payments so allowed shall be adjusted in the subsequent running bills by taking detailed measurements thereof. Final payment shall be made only on the basis of detailed measurements.

10- Further additional condition in the Arbitration Agreement No. 6, which is relevant in deciding the controversy, reads as follows:-

“6. No payment shall be made to the contractor for any damage caused by rain, snowfall, floods or any other natural causes whatsoever during the execution of work and no such claim on this account shall be entertained.”

11- It would also be material to quote additional condition No. 31, which reads as follows:-

“Before tendering, the tender shall inspect the site to fully acquaint himself about the condition in regard to accessibility of site nature and the extent of grounds

working conditions including stacking of materials installations of T & P etc. conditions affecting accommodation and movement of labour etc. required for the satisfactory execution of contract. No claim whatsoever on such account shall be entertained by the Department in any circumstances.

12- Perusal of the aforesaid provisions would show that the contractor, in this case is not entitled to claim any damage whatsoever in case of the contingency as provided for in the additional clause 6 of the contract. However, there is no provision whatsoever in the entire agreement or the law of contract as such wherein a contractor is debarred from damages, as also is just and due payment for catastrophe caused by the act of mankind. It is also not provided anywhere, in the contract that in case, any loss is sustained by the Government out of any so called natural cause, the appellant i.e. Union of India can recover the same from the contractor any amount paid by way of intermediary payments in accordance and the provisions of clause – 7 of the agreement, shall relates to payments to be made to the contractor for works executed to the extent as measured by the appellant.

13- The record in the instant case shows that the contractor/opposite party received the payment for work actually executed upto a particular date where after the mishap of sliding of the hill occurred. Therefore, all the payments received by the contractor were for works actually executed by him to the satisfaction of the appellant and he received the payments undoubtedly on an intermediary basis but for the partial execution of the work done by him. There was no occasion for the appellant to contend that because of the payment had

been made on an intermediate basis, it could not be said that the payments were not made in fact for works executed. The finding recorded by the Arbitrator in this regard is without application of the mind and considering the provisions of the agreement in their totality.

14- It is now to be considered whether the Arbitrator has committed any misconduct while passing the award or not. In case, if the Arbitrator has passed the award without considering the relevant clauses and conditions of the agreement then certainly the award passed by the Arbitrator would come within the ambit of misconduct.

15- The record further reveals that the Arbitrator in the arbitration proceedings awarded a sum of Rs. 829000/- in favour of the appellant/Union of India. The Arbitrator referred to additional condition No. 31 as well as clause-7 of the Arbitrator agreement but it appears that the Arbitrator had confined himself only to the statement of facts without appreciating the material evidence on record. The interpretation made by the Arbitrator in considering the provisions of the agreement in their totality appears to be a futile attempt to build up a case in favour of the appellant as he has totally ignored the relevant aspect of the matter.

16- The evidence available on record shows that the quarters which were earlier in existence were demolished and the site was developed under the supervision of Union of India/appellant who alone had complete knowledge of the site condition. The appellant did not divulge the condition at all to the tendering contractors. In fact, breast walls had been built consequently in skeletal form next to the site of the construction where

the accident actually occurred. This developmental process, was not taken into consideration by the Arbitrator at all and he also did not take into consideration that the possible consequences of this developmental work were only man made and not the work of nature. It appears that the Arbitrator without considering the aforesaid factor has misconduct himself in publishing his award on findings totally extraneous to the facts, which actually transpired for reasons best known to him.

17- The Arbitrator himself was of the opinion that the mishap which happened, was beyond control of the contractor, therefore, it is quite clear that in the mishap, the contractor cannot be said to be careless nor the contractor had any role in the mishap. An inquiry committee was appointed by the Department and the report submitted by the inquiry committee reveals that no survey of the site was done before raising the construction and whatever, the mishap happened, no measures were taken to check the same. Paper No. 53-C is the report, which indicates that no sufficient arrangement for drainage was made at the spot. The contractor did not have any occasion to select or change the site as the site was given to the contractor by the appellant. Para – 17 of the report also indicates that the retaining wall which was raised at the site by another contractor was not up-to standard. Therefore, the award published by the Arbitrator is not covered by any of the clause or condition envisaged in the agreement. The material available on record shows that in the instant case, the Arbitrator had acted most unreasonably, irrationally and capriciously by ignoring the limits of the contract and the categoric undertaking contained in the documents to which the attention was drawn by the

party in the objections filed before him. The award passed by the Arbitrator, being in complete disregard to the evidence and by out-stepping the limits of his authority, is liable to be set aside.

18- The court below has, thus rightly reached to the conclusion that the Arbitrator mis-conducted himself in passing the impugned award. I do not find any ground to interfere in the findings recorded by the court below allowing the miscellaneous suit filed by the respondent No. 1 and setting aside the award dated 23/24.03.1988 passed by the Arbitrator.

19- On the basis of the evidence on record, I come to the conclusion that the appeal lacks merit and is liable to be dismissed.

20- Accordingly, the appeal is dismissed. The impugned judgment and order dated 12.08.2004 passed by Additional District Judge/Ist F.T.C., Dehradun in O.S. No. 618 of 1988 M/s Suresh Brothers Vs Union of India is hereby confirmed.

(B.C. Kandpal, J.)

Dated: November 08, 2006.

Aswal.